

FRANK CIUFO,

Petitioner,

vs.

SOMERSET COUNTY AGRICULTURE
DEVELOPMENT BOARD,

STATE OF NEW JERSEY

OAL DKT. NO.: ADC 4217-11

AGENCY REF. NO.: SADC #1033

FINAL DECISION

Respondent.

PROCEDURAL HISTORY AND FINDINGS OF FACT

On October 15, 2010, Thomas Leach, Branchburg Township's municipal land use officer, submitted a "Right to Farm Disputes - Application for Hearing" (the "Hearing form") to the Somerset County Agriculture Development Board ("SCADB" or "board") regarding uses occurring on a residentially-zoned 9.44 acre, farmland assessed property located at 310 Reyna Place and designated on the township tax map as Block 80, Lot 10.02 ("the property").

Under the "Complaint" section of the Hearing form, Leach asserted that Mr. Frank Ciufo

is using the property for his lawn cutting business. He is storing 5 trucks with his company's (Simple Cuts) logo on the property along with equipment for lawn cutting, landscaping[,] debris & materials, and trailers for their lawn mowers. I have complaints from a resident. . .and [from] the [Homeowners'] Association for this subdivision.

The property is owned by Mr. Anthony Ciufo, a resident of South Carolina, according to the 2011 FA-1 form. The FA-1 also lists the farm operator as "Frank and Angela Ciufo d/b/a Simple Cuts, LLC, 310 Reyna Place, Neshanic Station, NJ 08853". The form reports that there are 1.05 acres of cropland harvested, 4.36 acres of permanent pasture and 4.03 acres of appurtenant woodland. The land occupied by ornamental crops is 0.4 acres of "Trees and shrubs", two (2) horses were listed as livestock, and 1.05

acres were devoted to fresh water pond fish.

Leach noted in the Hearing form that Frank Ciufo is the son of Anthony Ciufo. Both individuals will be referred to interchangeably as "Ciufo" for the purpose of this Final Decision.

Prior to filing the Hearing form with the SCADB, Leach had obtained a November 2009 resolution from the Branchburg Township Board of Adjustment providing an interpretation that municipal ordinances governing agricultural uses in residential zones did not allow for the storage of commercial equipment or vehicles without a variance or unless the activity qualified as a pre-existing, nonconforming use. Leach sent a copy of the resolution to Ciufo on January 29, 2010 with a warning that a summons would be issued if the commercial vehicles were not cleared from the property in 30 days. The vehicles were not removed in a timely manner, so Leach filed a March 29, 2010 zoning summons in municipal court against Ciufo for storing commercial vehicles in a residential zone. That case was dismissed after the judge and prosecutor instructed Leach to appear before the SCADB.

In the Hearing form, Leach asked the SCADB "to determine if the storage of the commercial trucks for lawn cutting, equipment and trailers are [sic] protected by the Right to Farm Act".

After receiving Leach's Hearing form, SCADB staff assembled a large amount of written background information spanning a 3-year period relevant to the Ciufo-Branchburg land use issues, including letters and memoranda between municipal officials, correspondence from Branchburg Township to Ciufo and from his attorney, phone messages and emails from complaining neighbors, and photographs of the commercial vehicles on the property. These documents and materials were listed in and attached to an SCADB staff summary entitled "Ciufo Farm/'Simple Cuts Landscaping' Request For Determination of Agriuculture [sic] Management Practice".

On October 25, 2010, SCADB staff notified all interested parties in the Ciufo matter that it would make an initial case presentation to the SCADB on November 8, 2010 and that the board's Right to Farm subcommittee would conduct a further, more detailed review of the preliminary

information. On November 5, 2010, Christopher Stevenson, Esq., counsel for Ciufu, submitted to the SCADB a package of some 13 letters, including attachments, between Stevenson and Branchburg Township officials over a 2-3 year period regarding land use issues surrounding his client's property.

The board's Right to Farm subcommittee met on November 22, 2010 and determined that, although Ciufu operated a "commercial farm" as defined in N.J.S.A. 4:1C-3, the SCADB had no jurisdiction over the case because the storage of commercial non-agricultural vehicles is not a protected activity under the Right to Farm Act. The subcommittee confirmed these initial findings to the SCADB at the board meeting on December 13, 2010. Mr. Stevenson, who attended the December 13 meeting, asked to submit more information showing how the commercial vehicles were used for farming operations, and the SCADB agreed to carry the matter to January 18, 2011. Due to a scheduling conflict, Mr. Stevenson advised the board in early January 2011 that he could not attend the January 18 meeting, so the case was adjourned to February 14, 2011.

The SCADB held hearings on the Ciufu matter at meetings on February 14 and March 14, 2011. Both hearings were attended by Leach and Stevenson, and the minutes for each hearing recite that "Mr. Stevenson contacted Mr. Ciufu, owner of the property, via cell phone and kept him on speaker phone for the duration of the discussion." Mr. Ronald Korditski, chairperson of the homeowners' association for the residential development adjacent to the Ciufu property, attended the February 14, 2011 hearing.

At the February 14 hearing, Leach and Ciufu provided testimony and were questioned by John Lore, Esq., Somerset County deputy counsel, by Stevenson, and by SCADB members. Korditski also testified. Based on the Right to Farm subcommittee's preliminary finding that the use of commercial vehicles did not appear to be related to agricultural operations on the Ciufu property, the SCADB advised Ciufu and Stevenson to provide more detailed information about usage of the trucks; how long the trucks are stored on the property; photographs of the vehicles; and a report on gross sales of agricultural and horticultural products from the property.

In response to the SCADB's request, the board received

from Ciufu an extensive written report entitled "Ciufu Farm - Simple Cuts, LLC, Farm, Tree Nursery & Landscaping, Aquaculture 'Fishing Hole', Horses & Livestock". The report provided a history of the property, a breakdown of income generated from the sale of nursery stock as of December 31, 2010 totaling \$23,275.00, and five (5) pages of scheduling and other tables showing how, when and why the commercial vehicles were used in connection with agricultural operations on the property, including the amount of time each truck was not in use.

At the March 14, 2011 meeting, the SCADB formally adopted the Right to Farm subcommittee's preliminary finding that storing the commercial non-agricultural vehicles was not protected by the Right to Farm Act. According to the meeting minutes, Lore noted that of the five (5) trucks on the property, only one was registered as a farming vehicle; an SCADB member concluded that "the truck usage in question clearly leaned toward the landscaping business". Finally, the board moved "to forward this matter to the SADC for a determination". The SCADB adopted a resolution memorializing its findings on March 22, 2011.

Ciufu appealed the SCADB resolution to the State Agriculture Development Committee ("SADC" or "Committee") by email from Stevenson dated March 31, 2011, and the matter was transmitted by the SADC as a contested case to the Office Administrative Law (OAL) on April 1, 2011.

OAL PROCEEDINGS AND INITIAL DECISION

On August 5, 2011, Ciufu filed a motion in the OAL to dismiss the case based on arguments, presented by brief, that the matter was improperly before the OAL. The SCADB filed a responding letter brief dated August 31, 2011.

Ciufu claimed that the SCADB's resolution was invalid because Leach's "Right to Farm Disputes - Application for Hearing" was a complaint by Branchburg Township against a commercial farmer that the board should have referred to the SADC pursuant to N.J.S.A. 4:1C-10.1(c) and N.J.A.C. 2:76-2.10(c), as the storage of commercial vehicles on a farm was a disputed agricultural activity not addressed by an agricultural management practice (AMP) set forth in SADC regulations. Ciufu admitted that the SCADB

was entitled to gather facts and have a hearing to determine whether the dispute concerned activities that either are or are not addressed by an agricultural management practice recommended by the [SADC], [but] the [S]CADB was not entitled to conduct a hearing on the substance of the complaint and then render a decision on it. [Ciufu brief at p. 4].

The SCADB contended that it accepted the case after Leach was directed to the board by the Branchburg Township municipal court, that the board attempted to address longstanding and unresolved issues between the township and Ciufu regarding the presence of commercial vehicles on the property, and that the SCADB followed its customary fact-collection and review process to determine whether or not the board had jurisdiction to hear the matter [SCADB brief at p. 10].

In a May 29, 2012 Initial Decision, the administrative law judge (ALJ) granted Ciufu's motion, determining that the SCADB should have deemed the matter a complaint by Branchburg Township against a commercial farmer. The ALJ ruled that by retaining the case and rendering a decision, the SCADB improperly considered the case before it to be a request for an SSAMP, which could only have been requested by Ciufu and not by Leach. Instead, according to the ALJ, Branchburg Township was a "person aggrieved by the operation of a commercial farm" triggering N.J.S.A. 4:1C-10(c) and N.J.A.C. 2:76-2.10(c) in which a county agriculture development board (CADB) transmits the dispute to the SADC in the absence of an AMP promulgated in agency rules. The ALJ concluded that the SCADB did not comply with the statutory requirements in the Right to Farm Act, that the matter was prematurely before the OAL and must be dismissed, and that the board must forward the case to the SADC for a hearing in accordance with the above-noted statute and regulation. Neither party filed Exceptions to the Initial Decision.

The SADC received the Initial Decision on May 30, 2012. On June 20, 2012, after the time for Ciufu and the SCADB to file Exceptions to the Initial Decision had expired, the SADC sought an extension of time to file a Final Decision due to the sequencing of SADC meeting dates. On June 27, 2012, the OAL granted an extension until August 30, 2012.

CONCLUSIONS OF LAW

The Right to Farm Act, N.J.S.A. 4:1C-1, et seq. ("RTFA" or "Act") expresses the Legislature's intent to protect from nuisance actions and unreasonable local government regulations those agricultural activities and commercial farming operations employing "recognized methods and techniques of agricultural production". N.J.S.A. 4:1C-2a. and e. To those ends, the RTFA recognizes several permitted agricultural activities conducted on a commercial farm that may preempt municipal ordinances and county resolutions unduly restraining those activities and that are insulated by an irrebuttable presumption that the activities do not create a public or private nuisance. N.J.S.A. 4:1C-9 and 10. A commercial farm, provided it is in compliance with Federal and state law and does not pose a direct threat to public health and safety, can engage in the following agricultural activities set forth in N.J.S.A. 4:1C-9 (the "section 9 activities"):

- a. Produce agricultural and horticultural crops, trees and forest products, livestock, and poultry and other commodities as described in the Standard Industrial Classification for agriculture, forestry, fishing and trapping or, after the operative date of the regulations adopted pursuant to section 5 of P.L.2003, c.157 (C.4:1C-9.1), included under the corresponding classification under the North American Industry Classification System;
- b. Process and package the agricultural output of the commercial farm;
- c. Provide for the operation of a farm market, including the construction of building and parking areas in conformance with municipal standards;
- d. Replenish soil nutrients and improve soil tilth;
- e. Control pests, predators and diseases of plants and animals;
- f. Clear woodlands using open burning and other techniques, install and maintain vegetative and terrain alterations and other physical facilities for water and soil conservation and surface water control in wetland areas;

- g. Conduct on-site disposal of organic agricultural wastes;
- h. Conduct agriculture-related educational and farm-based recreational activities provided that the activities are related to marketing the agricultural or horticultural output of the commercial farm;
- i. Engage in the generation of power or heat from biomass, solar, or wind energy, provided that the energy generation is consistent with the provisions of P.L.2009, c. 213 (C.4:1C-32.4 et al.), as applicable, and the rules and regulations adopted therefor and pursuant to section 3 of P.L.2009, c. 213 (C.4:1C-9.2); and
- j. Engage in any other agricultural activity as determined by the State Agriculture Development Committee and adopted by rule or regulation pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.).

The RTFA established a conflict resolution process that directs persons aggrieved by the operation of a commercial farm to file a complaint with the appropriate CADB or, if no CADB exists, with the SADC. N.J.S.A. 4:1C-10.1a. and N.J.A.C. 2:76-2.10(a).

A CADB's handling of a complaint is controlled by two (2) alternate tracks set forth in N.J.S.A. 4:1C-10.1b and 10.1c, as follows:

- b. In the event the dispute concerns activities that are addressed by an agricultural management practice recommended by the committee and adopted pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), the county board shall hold a public hearing and issue findings and recommendations within 60 days of the receipt of the complaint.
- c. In the event the Committee has not recommended an agricultural management practice concerning activities addressed by a complaint, the county board shall forward the complaint to the committee for a determination of whether the disputed *agricultural operation* constitutes a generally accepted agricultural operation or practice. Upon receipt of the complaint, the committee shall hold a public

hearing and issue its decision, in writing, to the county board. The county board shall hold a public hearing and issue its findings and recommendations within 60 days of the receipt of the [SADC's] decision. [Emphasis added].

N.J.A.C. 2:76-2.10(c), effectuating the RTFA's complaint procedure, is substantially similar to N.J.S.A. 4:1C-10.1(c):

(c) If a board exists and the dispute concerns activities that are not addressed by an agricultural management practice recommended by the Committee and adopted pursuant to the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and N.J.A.C. 2:76-2.2 or a site specific agricultural management practice adopted pursuant to N.J.S.A. 2:76-2.3, the board shall forward the complaint to the Committee requesting the Committee's determination of whether the disputed *agricultural operation* constitutes a generally accepted operation or practice. [Emphasis added].

After receipt of the complaint from the CADB, the SADC

. . .shall contact the commercial farm operator to provide evidence that the agricultural operation is a commercial farm as defined in N.J.A.C. 2:76-2.1, and, if the Committee determines that the operation is a commercial farm, hold a public hearing. [N.J.A.C. 2:76-2.10(c)2].

The RTFA, therefore, establishes distinct jurisdictional guideposts for a CADB in the context of processing complaints against commercial farmers in N.J.S.A. 4:1C-10.1b and c. If an AMP exists that addresses a disputed activity, then the CADB retains jurisdiction and hears the case. But if no AMP exists, transmittal of the case to the SADC is based on a jurisdictional predicate that an "agricultural operation" is in dispute requiring the agency's determination whether the operation is generally accepted. The Legislature's directive is clear, and draws from the RTFA's findings that only those permitted *agricultural* activities listed in N.J.S.A. 4:1C-9 merit protection and, in turn, merit the SADC's attention if a complaint is filed with a CADB but no AMP has been promulgated.

The CADB plays a critical role in determining not

merely whether a dispute exists, but whether, in the absence of a promulgated AMP, the activities in dispute appear to be eligible for right-to-farm protection pursuant to N.J.S.A. 4:1C-9. Only when a CADB finds such a nexus is it required to forward the complaint to the SADC for processing under the right-to-farm complaint procedures. The SADC did not contemplate that CADBs would refer right to farm cases that did not involve section 9 activities. However, once a CADB decides that a complaint implicates section 9 activities, a referral is made to the SADC which then analyzes whether the farm satisfies the "commercial farm" eligibility criteria in N.J.S.A. 4:1C-3.

The SADC's interpretation of the conflict resolution process is not only supported by the text of the RTFA and agency regulations, but also makes practical sense. Not every activity or potential activity on a farm is connected to those listed in N.J.S.A. 4:1C-9, and there are any number of activities that occur on a commercial farm for which the SADC cannot address in an AMP, in the agency's discretion, because they are or may be beyond the scope of the RTFA. We reject the notion that, merely because a complaint is filed against a commercial farm, a CADB is automatically required to refer the matter to the SADC because no AMP exists. For example, we would not expect a CADB to forward a complaint concerning the establishment of a used car lot on a commercial farm based on the fact that the SADC has not promulgated an AMP for used car lots. Such a mechanical application of the RTFA and SADC regulations undermines the Act by encouraging the processing of cases clearly unrelated to the protection of section 9 activities. For those activities that a commercial farmer believes are somehow related to section 9, a contrary finding by a CADB is appealable to the SADC pursuant to N.J.S.A. 4:1C-10.2.

The practical interpretation adopted by the SADC in this matter also saves limited county and SADC resources and the time and legal expenses of the commercial farmer. The transmittal of a complaint by a CADB to the SADC is but the first step in an otherwise long procedure, set forth in N.J.S.A. 4:1C-10.1c., that continues with an SADC hearing, a return of the case to the CADB, a hearing before the CADB, a potential appeal to the SADC, transmittal of the appeal to the OAL for an Initial Decision, and return of the case to the SADC for a Final Decision appealable to the Superior Court, Appellate Division as final agency action.

By recognizing the CADB's key role in screening a complaint against a commercial farmer to determine whether the activity in dispute is related to section 9 of the RTFA, the SADC expedites the hearing process without depriving the commercial farmer's appeal rights.

We also observe that the SCADB is not the only board to engage in the "gatekeeper" function with respect to determining whether the disputed activity is agricultural to begin with. See, Morris CADB letter decision dated June 9, 2006 at <http://nj.gov/agriculture/sadc/rtfprogram/conflictres/formal/rtfd/ecstephenscadb.pdf> (processing trees from other properties); and Burlington CADB Resolution #2012-12 (March 8, 2012) at <http://nj.gov/agriculture/sadc/rtfprogram/conflictres/formal/moriuchi.pdf> (processing into mulch the raw wood and wood chips from other properties).

Before applying these legal principles to the Ciufu matter, we first make certain observations about the proceedings at the SCADB level contributing to the somewhat muddled record before the SADC at the time Ciufu filed his appeal and the agency was considering transmittal to the OAL.

The SCADB initially encountered an inconsistent Hearing form completed by Leach, who sought both the board's interpretation whether the RTFA applied to Ciufu's commercial vehicles and referenced the enforcement action Leach had taken against Ciufu by filing the municipal court zoning summons. The rather unusual contents of the Hearing form were compounded by the close collaboration between Ciufu and the SCADB prior to and during the hearings with respect to the submission of extensive written materials, as well as Ciufu's testimony, regarding the activities specific to the Branchburg property. There is no evidence in the February 14 and March 14, 2011 meeting minutes that Ciufu objected to the handling of the case by the SCADB, and Ciufu admitted in his OAL motion brief that the SCADB "was entitled to gather facts and have a hearing. . ."

It is not difficult to see how an ambiguous right to farm complaint by Leach could be transformed over time into what appeared to be an SSAMP, an appearance that was memorialized in the SCADB Resolution's first "WHEREAS" paragraph citing N.J.A.C. 2:76-2.3, the regulation governing applications for an SSAMP, and the second

"WHEREAS" paragraph, noting that Leach had submitted a written request "for determination of a generally accepted Agricultural Management Practice on the Ciufu Farm". Finally, while the Resolution was, at the request of Ciufu, forwarded to the SADC "for their [sic] review and determination" as if the case were transmitted to the agency in accordance with the complaint process in N.J.S.A. 4:1C-10.1(c) and N.J.A.C. 2:76-2.10(c), the procedure at N.J.S.A. 2:76.2.3(e) also requires that the CADB send a copy of the SSAMP decision to the SADC.

Despite the appearances noted above that the case may have been handled by the SCADB as an SSAMP application, we **FIND** that the Hearing form provides evidence that the matter was a right to farm complaint, pursuant to N.J.S.A. 4:1C-10.1(a) and N.J.A.C. 2:76-2.10(a), filed by Branchburg Township because it had a dispute against Ciufu regarding the storage of commercial vehicles on the property. A brief review of the Hearing form makes our finding abundantly clear. The document is entitled "*Right to Farm Disputes - Application for Hearing*" (emphasis added). The first page of the form advises that the SCADB "can hold public hearings and issue findings and recommendations on disputes between commercial farm operators and persons who are aggrieved by farm operations" and that the board's report will be issued "within 60 days from the receipt of the complaint." There are sections of the form for "Complainant's Information", "Complaint" and "History of Complaint", all of which were completed by Leach. The SADC agrees with the ALJ, and reiterates the agency's findings in Bohlin v. Brickyard, LLC, OAL Dkt. No. ADC 743-08, that SSAMP requests can be filed only by an eligible commercial farm owner.

Although we have found that the Hearing form filed by Leach was a complaint and should have been treated as such by the SCADB, that conclusion does not end our analysis. We cannot ignore the fact that, notwithstanding the anomalies the SADC has observed in the SCADB proceedings, the board undertook substantial due diligence before determining that the storage of commercial vehicles by Ciufu was not an agricultural operation, and therefore not eligible for right to farm protection pursuant to N.J.S.A. 4:1C-9. Based on that determination, the SCADB did not transmit the complaint to the SADC and, instead, found that it had no jurisdiction to hear the case. The propriety of the board's refusal to hear the case due to lack of

jurisdiction is the real issue, not how the board interpreted the Hearing form.

The SADC supports the SCADB's decision to analyze the substance of the matter rather than blindly rely on the Hearing form, and to initially establish the jurisdictional predicate whether or not there was an actual agricultural operation recognized in N.J.S.A. 4:1C-9 in dispute. The board's procedural stance in this case, we have earlier observed, is fully justified by N.J.S.A. 4:1C-10.1(c) and N.J.A.C. 2:76-2.10(c). Further, by making that initial determination, the board obviated the resultant multi-hearing process otherwise contemplated in N.J.S.A. 4:1C-10.1(c), saving the government and private parties the time and expense of unnecessary, additional administrative litigation.

We do not pass judgment on the SCADB's decision that Ciufo's commercial vehicles were associated with a landscaping business and unrelated to agricultural activities on the property. Instead, given our determination to reset these proceedings based on the SCADB's assumption and disposition of the jurisdictional question, we remand the matter to the OAL in accordance with N.J.A.C. 1:1-18.7(a). The remand will allow the ALJ to determine whether the commercial vehicles on the Ciufo farm are a protected agricultural activity in accordance with the RTFA, as that substantive issue was not considered in the motion for summary decision limited to whether the SCADB followed proper procedures.

The board created its own written record, in addition to the parties' testimony, supplemented by materials submitted by Stevenson and the extensive written report from Ciufo. There already exists substantial record evidence on the ultimate issue in this case---whether, and to what extent, the trucks on the Ciufo property are related to the permitted agricultural activities set forth in, and therefore protected by, N.J.S.A. 4:1C-9, so we do not envisage any undue burdens on the OAL or the parties to participate in the remand hearing.

Accordingly, the SADC hereby **AFFIRMS** the Initial Decision determining that Leach, on behalf of Branchburg Township, filed a right to farm complaint against Ciufo for the storage of commercial vehicles, but it **REJECTS** the Initial Decision by holding that the SCADB possessed the

legal authority to determine whether it had jurisdiction to hear the Ciufu case before transmitting it to the SADC as a conflict dispute resolution in accordance with N.J.S.A. 4:1C-10.1(c) and N.J.A.C. 2:76-2.10(c). The SADC also **REJECTS** the Initial Decision requiring the SCADB to remand the Ciufu case to the SADC for a public hearing pursuant to N.J.A.C. 2:76-2.10(c). Finally, by separate order, the SADC remands this case to the OAL pursuant to N.J.A.C. 1:1-18.7(a).

IT IS SO ORDERED.

Dated: July 26, 2012

/s/ Douglas H. Fisher
Douglas H. Fisher, Chairman
State Agriculture Development
Committee

S:\RIGHTTOFARM\Cases\SOMERSET\1033 - Ciufu\Final Decision
July 2012.doc